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### Beyond Agamben

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## **Beyond Agamben: Sovereignty, policing and 'permissive space' in South Africa, and beyond**

Across the social sciences, there is a growing recognition that 'policing... is very much more than what the police do' (Baker 2007). The practice of maintaining law, order and security is performed by a wide range of actors and organisations, using a broad spectrum of strategies to achieve their varying visions of good conduct. The relative importance of the state police within this 'policing landscape' (Marks and Wood 2007) is something that must be proven, rather than assumed (Johnston and Shearing 2009). Consequently, it is encouraging to see an increasing number of studies into the 'policing organisations' and the more ephemeral, less-structured 'policing formations' responsible for 'everyday policing' across the globe (Buur and Jensen 2004:143)<sup>1</sup>.

By tackling questions of order and control, these studies speak to the heart of debates around sovereignty. In their attempt to better understand the dynamics of sovereignty at play, many have drawn on the work of Giorgio Agamben, and his concepts of the 'state of exception' and 'homo sacer' (e.g., Buur 2003; DeChaine 2012; Kirsch 2010; Kirsch and Gratz 2010:5; Rhodes 2005). However, having provided a critical reading of Agamben, I argue that this reliance is unproductive, for two key reasons. Firstly, Agamben's work is undermined by his undifferentiated, legalistic approach. Whilst he claims to be correcting or supplementing the work of Michel Foucault, his work ultimately represents the state-centric, uni-dimensional analysis of power that Foucault critiqued. This, in turn, closes any space for exploring the political contestation at the heart of questions of sovereignty. Secondly, attempts to make Agamben's terminology applicable to analyses of *de facto* sovereignty have proved unfruitful because they encourage us to gloss over what is analytically of most interest: how do people negotiate (with state actors and others) this ability to exercise illegal violence without repercussion when a legal framework supporting state sovereignty is formally in place? What relationships, rights and resources can those who are accused of criminality draw upon inside or outside the corridors of the state power to protect themselves against such violence? In this article, I suggest that instead of utilising the decisionist language of 'exception' we engage in the notion of 'permissive space', which gives us the capacity to explore these avenues of inquiry. My conclusions in this paper are drawn from an exploration of policing in Durban, South Africa and I close by illustrating the characteristics of permissive space in this context. That said, I will highlight the potential of this concept to apply to other empirical contexts across the globe. My research in Durban took place over ten months between 2010 and 2013, during which I conducted in-depth, semi-structured interviews with a non-probabilistic, purposely recruited sample of 130 residents across three policing sectors. To protect the identities of those who wished to remain anonymous, I refer to these police sectors by the name of the police stations under which they fall: Berea, Chatsworth and KwaMashu.

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<sup>1</sup> See, for example, Plasse-Couture (2013) in the West Bank, Shapiro (2009) in America, Cooper-Knock (2015) in South Africa, and Goldstein (2008) in Nicaragua.

## Agamben and everyday policing

Agamben's work has been hugely influential in recent debates on sovereignty, generating a great deal of commentary, critique, and empirical work (see: Durantaye 2009). His theoretical starting point is the sovereign decision. To explore this 'decisionist' perspective and its implications, we need to grasp two figures whom Agamben saw as having structurally similar relations to the law: the sovereign and *homo sacer* or 'bare life' (Agamben 1998:84). Agamben used these figures to challenge Foucault. He argued that if we understood their relationship to one another, and to the law, we would realise that 'bare life' was the necessary product of the sovereign decision (Agamben 1998:6). For Agamben, this meant that the bio-political had always been bound up in the exercise of sovereignty. Foucault, by contrast, had argued that bio-politics emerged as a defining feature of specifically modern politics and could be theoretically distinguished from sovereignty or, in Foucault's terms, 'juridical-institution politics'. Agamben (1998; 2005) held that modern politics simply amplified a bond between bio-politics and sovereignty that was there all along. In the analysis that follows, I begin by exploring the position of the sovereign, and Agamben's rendering of bare life, before analysing his take on sovereignty in contemporary times.

Agamben's work drew heavily on Carl Schmitt's 'decisionist' perspective on sovereignty (Schmitt 2006). Law, Schmitt argued, governed interactions in normal life. The sovereign, he claimed, was the one who could declare that the normal circumstances, upon which the law functioned, did not hold. Thus, the sovereign was in a 'relation of exclusion' with the law because he belonged to the legal system only in so far as he could decide when and if it needed to be suspended. This ability to decide upon the exception was not just constituted by the sovereign; it was constitutive of him (Agamben 2005).

The entity produced by this sovereign decision, caught in its own relation of exception to the law, was 'bare life'. For Agamben, bare life was not natural, unmediated life (*zoe*) but rather what was left when politically qualified life (*bios*) had been stripped of its legal-political protection (Agamben 1998:109). In Ewa Plonowska Ziarek's (2012) words, it was 'the remainder of the destroyed political bios'. Abandoned by law, bare life was considered valueless and could be subjected to unmediated sovereign violence. This 'inclusive exclusion' of bare life by the sovereign, Agamben argued, was captured in the figure of *homo sacer* within Roman Law. In Roman times, the 'sacred man' was a citizen who had been stripped of his political rights by virtue of being outlawed. He could be killed with impunity by those inside the community but not sacrificed by them because, having been reduced to a bare life, he lacked the value necessary for sacrifice (Agamben 1998). As Downey (2009) explained, he was, therefore, 'an outlawed citizen, the exception to the law' but he was 'still subject to the penalty of death and therefore still included, in the very act of exclusion, within the law'. Thus, for Agamben, the sovereign and *homo sacer* were the structural corollary of each other in relation to the law. To the sovereign, everyone was potentially *homines sacri*. To *homo sacer* everyone was a potential sovereign (Agamben 1998).

Although Agamben's theorizing owes much to Schmitt, the two philosophers differed on their interpretation of the state of exception. For Schmitt, the state of exception offered a means through which the law could claim that which previously lay beyond it: declaring a state of exception was a means of imposing *nomos* (legal order) on *anomie*, and ultimately either bringing it back into an existing (but temporarily suspended) constitutional order, or incorporating it within a new constitutional order. In temporary states of exception the 'normative aspect of law' had no force, while the 'force of law' had no normative basis in law (Agamben 2005:87). For Agamben, however, our current situation was one in which 'the exception has become the rule'.<sup>2</sup> What he saw was not a movement between law and *anomie*, but rather their reaching a point of indistinction. The state of exception, he argued, had opened up a 'juridical void' (Agamben 2005:43). Whilst law and politics may continue to refer to one another, they were no longer 'in relation' and the law could not constrain the violence of the state (Agamben 2005; see Huysmans 2008:173).

For Agamben, the paradigmatic example of this permanent state of exception was the concentration camp at Auschwitz. The emergence of this camp was not an anomaly, he suggested, but revealed a 'hidden matrix'<sup>3</sup> that was present in both liberal democracies and totalitarian states (Agamben 1998:166). Ultimately, what was of interest to Agamben was not the lives lived within Auschwitz but its juridical-political structure (Duranantaye 2009): in Agamben's mind, the camp was any space in which the state of exception became the rule and bare life was systematically produced. It was because he focused on the juridico-political structure of camps that he placed Guantanamo Bay and the Bari stadium, where Italian police contained Albanians before their deportation, in the same category as Auschwitz. In the context of Guantanamo, he argued that the Patriot Act of 2001 'radically erase[d] any legal status of the individual, thus producing a legally unnameable and unclassifiable being ... the object of a pure de facto rule ... entirely removed from the law and from judicial oversight' (Agamben 2005:30).

Agamben concluded that what Foucault saw as the emergence of bio-politics was, in fact, the emergence of the exception as the rule, which had shifted the 'realm of bare life' from 'the margins of the political order'. 'If today there is no longer any one clear figure of the sacred man', Agamben resolved, 'it is perhaps because we are all virtually *homines sacri*' (Agamben 1998:127), caught within a permanent state of exception of which the concentration camp of Auschwitz was paradigmatic.

### **Taking exception to Agamben**

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<sup>2</sup> Here he is following Walter Benjamin who argued that 'the "state of emergency" in which we live is not the exception but the rule', but whilst Benjamin made this argument with reference to the oppressed, Agamben generalises his state to apply to modern states as a whole.

<sup>3</sup> He saw the camp as paradigmatic in the Foucauldian sense of that word.

Whilst Agamben's theories are thought provoking, they are also flawed.<sup>4</sup> These flaws are significant for scholars using Agamben to under *de jure* states of emergency in South Africa (Hyslop 2011, Pillay 2008, Kihato 2007; Landau 2006; Mosselson 2010) but they pose an insurmountable hurdle for those studying the *de facto* sovereignty practiced in acts of everyday policing in the country, and beyond. Below, I focus on three key criticisms that undermine his case.

First, Agamben's conceptualisation of the 'state of exception' as a 'juristic void' misconstrued the relationship of law to violence. Guantanamo Bay, the Lindela Repatriation Centre in South Africa, and other camps are not 'legal no man's lands' in which law has no power to mediate the state's use of force (Agamben 2005). To understand more accurately how law functions, we need to shift our terminology from one of 'states of exception' to 'states of emergency' (Neocleous 2006, 2008). Providing a historical perspective on the evolution of the 'state of emergency' in Europe and the United States during the twentieth century, Neocleous (2006) demonstrates that 'the "state of emergency" became perhaps the most common prescription in the pharmacopoeia of statecraft' in both liberal and fascist states. Moreover, the legal powers of the state were often inflated as each new raft of emergency measures left their legacy to ordinary criminal law (Neocleous 2006; 2008). It is this process of incorporation, the normalisation of the state of emergency that differentiates Neocleous from Agamben: 'Far from suspending the law', Neocleous (2008:70) argues, 'violent actions conducted in "emergency conditions" have been legitimated through law on the ground of necessity and in the name of security'. Attempts to avoid legal condemnation are testament to the continued operation of the law in these moments.

This is certainly borne out in the history of South Africa. One of the most remarkable features about apartheid policing, for example, is that 'not only [was] much of what South African Police [did] perfectly legal, but what they [did] legally [could] be extraordinarily brutal' (Brogden and Shearing 1993:27). The Criminal Procedure Act 51 of 1977 section 49(2) allowed the police to shoot and kill suspects to prevent them from escaping. Suspects did not need to be forewarned, they simple had to be 'reasonably suspected of having committed a serious offence' such as petty theft with trespass (Brogden and Shearing 1993:27). For collective gatherings, the Police could shelter under the Internal Security Act of 1982, which permitted them to use firepower to disband illegal gatherings (Haysom 1990). A combination of section 50 of the Criminal Procedure Act and section 29 of the Internal Security Act of 1982 gave the Police legal cover to detain people for as long as they wished (Brogden and Shearing 1993:31). During the Sharpeville Massacre of 1961, the Soweto Uprising of 1976, and the States of Emergency in 1985-1986, the Police were protected from civil or criminal proceedings for their actions, providing they had acted in 'good faith' (Prior 1989). In 1986 alone, the SAP killed a recorded 710 people (Foster and Luyt 1986). Legislation was made all the more accommodating by judges who were usually willing to interpret the law leniently (Gordon 2006).

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<sup>4</sup> In this section, I leave aside the inaccuracies of his theoretical interpretation of Aristotle and his historical interpretation of Roman Law on which his conceptualisation of *zoe*, *bios*, and *homo sacer* rest (see Fitzpatrick 2001).

Nor is this legal work simply a charade that has, in practice, 'shed every relation to law' (Agamben 2005:59; see Brannstrom 2005; Humphreys 2006). The importance of the legal parameters set in a state of emergency has been demonstrated in George Karekwaivanane's work on Rhodesia, which recounted the experience of lawyers who held the state to account when it stepped outside the bounds of its own emergency legislation. Despite the draconian environment of 1970s Rhodesia, Karekwaivanane stated, 'the law remained as an important mode of rule' (Karekwaivanane 2011). David Anderson (2012:700) has made a similar argument about emergency rule in Kenya. Studying British abuse and torture in Kenya's uprising between 1952 and 1960, he showed how the British government sought to deny widespread torture, while 'Kenya's colonial violence workers' 'struggled to present torture as lying within the "rule of law"'. In other words, illegality and legality mattered. What is more, as the recent Mau Mau trials in London have demonstrated, the law has continued to matter, over fifty years later.<sup>5</sup> Thus, we should see law as the outcome of political power and contestation, which can facilitate as well as limit the exercise of state violence (see also Brannstrom 2005). Moreover, whilst the state may sometimes act illegally without repercussion, this does not make the law utterly devoid of its relation to life.

A second key critique of Agamben's work concerns his attempt to 'correct' Foucault. In attempting to synthesise the juridico-institutional politics of sovereignty and bio-politics, Agamben ultimately lost sight of bio-politics. Foucault claimed that 'bio-politics' was a productive drive to optimize and multiply life (Foucault 2002:138). This is fundamentally incompatible with Agamben's notion of bare life, which could be taken or allowed to persist. Bare life fits completely, and exclusively, within the rationale of juridical-institutional politics. Moreover, by arguing that a single decision determined the shift between inclusion proper and the 'inclusive exclusion' that created bare life, Agamben depicted 'bare life' as undifferentiated. If it is indeed true that 'everywhere on earth men live today in the ban of a law and a tradition... that include men within them in the form of a pure relation of abandonment' (Agamben 1998:51) then we are led to question whether the idea of 'homo sacer' and 'bare life' hold any analytical significance whatsoever. As Brannstrom (2005) asked, what do I have in common with those interned in concentration camps, neomorts being kept alive so that their organs might be transplanted and motorists killed in motorway accidents? And what do they have in common with one another? It would seem that 'even if all subjects are homines sacri they are so in very different ways' (Lemke 2005:7-8). Agamben's failure to recognise this adequately, Lemke has argued, can be traced back to the fact that he was concerned with thanatopolitics, not biopolitics: he was 'less interested in life than in its "bareness"' (Ibid.).

What is more, the 'bareness' to which he referred was primarily legal: Agamben was not concerned with the resources and strategies that remain when political-legal rights have been stripped away. In contrast, Caroline Humphrey (2004) has

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<sup>5</sup> David Anderson (2013), available at: <http://www2.warwick.ac.uk/knowledge/culture/maumau/> (last accessed 21st December 2013).

argued that people in everyday life 'do not simply acquiesce to the menace of sovereignty but interpose a solid existence of their own that operates collaterally or against it'. It is, therefore, vital to explore people's own world-views and life histories, as well as the wider social, political and economic landscape of which they are a part, to understand how sovereignty functions in everyday life, a point to which we return.

In fact, Agamben's underlying critique of Foucault was largely unwarranted: Foucault did not lose sight of juridico-institutional politics in his analysis of modern states but rather claimed that both were present, creating a 'demonic combination' (Ojakangas 2005:26). Where he differed from Agamben was in his belief that the two modes of power could not be reconciled (Ojakangas 2005:26). The advantage of Foucault's analysis of power is that he does not believe its exercise is reducible to a singular mode or institution (Jessop 2007), allowing us to look at the law and the state but also beyond them.<sup>6</sup> In contrast, Agamben was transfixed by the state and ignored its reception in society. But, as Barbara Honig (2009) reminds us, even sovereign decisions rely for their effect upon the 'orientation' of the ruled towards the ruler. This is borne out by work on the latter years of apartheid in South Africa. In the township of Alexandra, for example, Jonny Steinberg (2008:74) argues that life was disrupted by violence on all sides, creating a 'hunger for authority'. Amongst some township residents this created a conflicted orientation towards the instigators of 'state violence and depravity' who offered a brutal, contorted form of the order people desired (see also Dlamini 2009). Struggles over law and social order in apartheid South Africa were infinitely complex and were mediated through factors like class, race, gender and knowledge (Bozzoli 2004), all divides that Agamben 'ontologically erases' in his theories (Husyan 2008:165), closing any theoretical space for understanding political contestation, domination and resistance in society that does not produce anomic life (Papastergiadis 2006:437).

These flaws in Agamben's work have compromised the attempts of scholars to apply his insights to practices of everyday policing in South Africa. Their ideas of 'civic states of exception' (Kirsch 2010) or 'spaces of exception' (Buur 2003) suggest that citizens and state actors are able to act with an impunity that can simply be seized or decided upon. Certainly, in South Africa (as elsewhere), attempts to make the *de jure* mirror the *de facto* have often proved either ineffective or unwelcome. Nonetheless, the presence of the law offers the possibility of recourse. Equally as important, the law does not capture the spectrum of ways in which people may seek to defend themselves or gain recompense from others. Employing the language of exception encourages us to ignore rather than explore the rights, resources and relationships that people utilise to leverage a response, either inside or outside the state. Ultimately, it is

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<sup>6</sup> It could be argued that Foucault dismisses the state altogether. However, as Bob Jessop has highlighted, in his latter works Foucault is concerned with the state as 'a (if not the) crucial site for the 'institutional integration' of power relations' (Jessop ND:2). Although Foucault emphasises the importance of the microphysics of power, his focus is not limited to them. Instead, Foucault's 'approach is scalable and can be applied to the state, statecraft, state-civil society, or state-economy relations just as fruitfully as to the conduct of conduct at the level of interpersonal interactions, organisations or individual institutions' (Jessop ND:14).

precisely the difference between a state of exception and the negotiation of *de facto* sovereignty that should occupy scholars of everyday policing: How and why is it that citizens can negotiate (with state officials and others) the ability to exercise violence without legal repercussion? In what ways and why are these negotiations affirmed, challenged or undermined? We need a subtler approach than Agamben's to make sense of such questions.

### **Sovereignty and permissive space**

Rather than focusing on the exception, *a la* Schmitt (2006) or Agamben (1998; 2005), I draw on conceptions of sovereignty that are concerned with everyday life, which contains both norm and exception. In doing so, I 'question the quest for the ultimate "one" that decides on the exception' and instead I bring 'to the fore the multiple layers and practices involved in sovereignty' (Bottos 2009: 109). This is best captured, I will argue, in the concept of 'permissive space'.

At its root, sovereignty can be understood as a historically situated claim to authority over life, death, and everyday conduct that is always 'grounded in violence' but which may or may not be grounded in state law (Hansen and Stepputat 2006). Although the capacity for violence is a central component of sovereign power, the preceding analysis has demonstrated that focusing purely on the decision and the exercise of violence does not provide us with a full account of how sovereignty operates in practice; and the social, political and economic forces that shape it. For, as Robert Latham argued, what 'makes paramountcy possible are the bodies of relations that effectively structure practices and agency in any given area of social life' (2000:3). These are not all reducible to force and fear: the acceptance, adaptation or rejection of sovereignty cannot be understood without exploring the political, social, cultural and economic structures, relationships, and ideas that fill that the everyday life in which it is practiced (Humphrey 2004; Honig 2009).

All of this points to the fact that sovereignty is not simply a capability that can be possessed. Rather, it is a claim that is under constant negotiation against the claims of others and with those over whom it would be practiced (Hansen and Stepputat 2006; Humphrey 2004). It follows that *de jure* state sovereignty may not represent a meaningful claim to sovereignty in everyday life. In South Africa, however, I would argue that *de jure* state sovereignty continues to play an important, if inconsistent, role in everyday policing. The constitution, as Loren Landau (2010) has convincingly argued, only has a 'partial hegemony' over its citizens and 'irregularly determines the nature of socio-political interactions'. Nonetheless, this partial hegemony remains important in guiding the everyday negotiations over who can legitimately act as the ultimate political authority; who is allowed to exercise force, how, and against whom. Any analysis of sovereignty needs to incorporate this insight.

Caroline Humphrey's (2004) concept of 'nested sovereignty' comes close to capturing this perspective. In Siberia, she argued, 'localized forms of sovereignty' were contained within other forms of sovereignty, such as national sovereignty, whilst 'retain[ing] a domain in which control over life and death [was]



operational'. 'Nested sovereignty' is useful in this context because it allows us to recognise the fact that, in South Africa, the state is often able to exert a hierarchical claim to sovereignty on the basis of the legitimacy it holds in law and its coercive power.<sup>7</sup> The situation, however, is less ordered and rigid than Humphrey's term would suggest, and we cannot always assume that hierarchical claims made by the state are considered feasible or desirable by itself or others. Given this shortcoming, I believe that we need a new conceptual language to explore the negotiation of *de facto* sovereignty. I use the remainder of this article to introduce the term 'permissive space', explain its parameters, and use examples both from my own research in Durban and from research on policing across the world to emphasise its broad applicability.

Arguing that the state should not have 'conceptual priority' (Shearing and Wood 2003:404) in understanding the form and functioning of everyday policing, my work has a conceptual affinity with studies on nodal policing (Johnston and Shearing 2009; Marks, Shearing and Wood 2009). This body of work has concentrated on the mapping emergent policing nodes (spanning state institutions, the private sector, and society) and delineating their interactions with one another in South Africa, and beyond. My work on permissive spaces can contribute to this broader literature by providing a conceptual tool with which to explore the negotiation of policing that breaks state laws.<sup>8</sup> Whilst the application of permissive space is focused on policing here, the concept can also be applied to other forms of law breaking in South Africa, and beyond.

### **The Parameters of Permissive Space**

The notion of permissive space captures the idea that those who act illegally must negotiate their impunity with other citizens and the state, so as to avoid repercussions for their actions either within or beyond the criminal justice system. Within permissive space, illegal practices are allowed to continue unabated and may be conferred with legitimacy. Negotiations over permissive space shape the imaginaries, boundaries, and practices of states and societies across the globe (Sieder 2001; Heald 2005:279, 281).

The concept of 'permissive space' captures a double notion of permission and permissiveness: it allows for the possibility of constraint and excess to be simultaneously at stake within the same act of negotiation. For George Bataille, sovereignty was defined by excess for its own sake. He believed that 'life beyond utility is the realm of sovereignty' (Aksoy 2011:219). Consequently, the sovereign actor was only concerned with the present, beholden to neither the past nor the future. In contrast, the idea of permissive space re-situates even the most excessive sovereign performance in the fray of life, to be shaped by the web

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<sup>7</sup> It is for this reason I have focused on Humphrey's (2004) work here rather than the thought-provoking work of Comaroff and Comaroff (2006:41), which details 'the dispersal of state authority into patchworks of partial, horizontal sovereignties'

<sup>8</sup> Work on nodal policing frequently discusses the issue of policing 'regulation'. The question of regulation is bound up with ideas of authority and legitimisation that I utilise throughout. However, I tend not to use the term 'regulation' itself because it has connotations of fixity and my work seeks to emphasise the potential fluidity that is captured in the notion of 'negotiation'.

of relationships in which it is enmeshed and executed with an eye to how these relations will develop over time.

The notion of permissive space is a flexible one. Those within permissive spaces can act as sovereigns but this sovereignty is as fragile as the negotiated space itself. The tone of negotiations that creates permissive spaces ranges from amicable to antagonistic. Negotiation, in this context, simply emphasizes that permissive spaces are not unilaterally imposed, nor are they immutable. Instead, they are established in an on-going exchange. This exchange need not be symmetrical and the 'consensus' reached in such negotiations may be fraught and shallow. In some cases, the borderline between 'decision' and 'negotiation' may appear thin. However, to some degree, impunity is always unstable, open to the possibility of (re)negotiation at different times, scales, and spaces.

Using the concept of permissive spaces, we expose 'negotiation[s] over the logics of authorization and subjection that stitch together the polity' in South Africa, and beyond (Smith 2011). Such negotiations are present across all sections of society. The negotiation of permissive spaces, for example, is a necessity for poorer South Africans who rely on the fluidity and flexibility it provides to make their livelihoods and lives tenable in the 'intimate and claustrophobic' nature of township life (Jensen 2010). However, negotiation also suits the desires of the affluent, who can utilise this same fluidity to press their privilege further. Therefore, unless one believes that legitimacy and legality are inherently bound, the process of negotiation in and of itself is amoral.

Unlike the decisionist concepts explored above, the concept of permissive space provides us with the conceptual room to avoid state-centric approaches, without assuming that the state is unimportant. It allows us to recognise the potential importance of actors inside, outside and on the constructed borders of the state, and enables us to explore the multiple forms of power each may hold. In so doing, the concept of permissive space acknowledges that the location of sovereignty is 'never self-evident' (Kelly and Shah 2006). This is not just because it is 'dispersed', as Kelly and Shah (2006) argue, but also because claims and counter claims can be *concentrated* within the same, conflicted individual. The police who are charged with making state sovereignty a reality, for example, have complex motivations as 'civilian/citizens' and state officials. Their interactions reveal a 'play of force and sentiment... social contract and individual conviction' (Chalfin 2008, 2011). At some moments they may seek to create or reinforce permissive space and at others they make work to destroy it. Over the course of my research in Durban, I witnessed several situations in which the police oscillated between these two positions – their willingness to support legal infringements waning as citizens pushed for action to be taken or increasing in response to political pressure or economic reward. The concept of permissive space allows us to explore all of these possibilities.

In the sections that remain, I will first explore how we can conceptualise the parameters of permissive space shifting in the midst of negotiations that can establish, extend, contract, close or collapse these spaces. My final section delves

deeper in to the notion of space, exploring the relationship of permissive space to physical space in South Africa.

### **Permissive Space: Establishing, Contracting, Closing, and Collapsing**

Permissive spaces can be relatively broad in the acts they allow and relatively stable over time. Conversely, they may also be narrow, fleeting, and unstable. Much depends on the degree of permission granted and the power of those granting it: both of which are mutable. Take private road closures in Durban, for example. The degree to which road closures or 'boom-gating' is opposed, facilitated, permitted or tolerated varies greatly from municipality to municipality. Durban is located within eThekweni municipality. At the turn of the century, eThekweni's opposition to road closures was fierce, driven by then City Manager Michael Sutcliffe. Echoing the findings of the South African Human Rights Commission, eThekweni municipality stressed that road closures contravened people's freedom of movement. Strong rhetoric and legal action faced anyone who infringed this ban. When I interviewed the city manager ten years later, his opposition to road closure remained. In the interim, however, the situation on the ground had changed. Sutcliffe's attention drifted onto other matters, not least Durban's hosting of the 2010 World Cup. He had, in his words, 'other headaches to deal with'.

As the City Manager's anti-closure campaign waned, those who lived on side streets and dead-ends had the opportunity to negotiate a relatively stable permissive space for action with their local police and councillors. In diverse areas across Durban – from former townships to former suburbs - residents had notable success in this regard. In public, the police and councillors would oppose these exclusionary practices but in private, several had agreed with their constituencies not to act unless they received public complaints on the matter. Given that private security companies had effectively normalised the contravention of freedom of movement in these areas (see: Berg 2007, Kempa and Singh 2008), such complaints were not forthcoming. Therefore, residents and councillors alike acknowledged that their negotiated compromise had created a stable permissive space. This was why several people I spoke to referred to the practice as "illegal in inverted commas": road closures had become a 'public secret' (Taussig 1992), slowly proliferating across the municipality.

As the case above demonstrates, the breadth and stability of permissive space often shifts meaningfully over time. In this example, permissive space had expanded and solidified. The converse, however, was also possible: permissive space could contract, covering fewer acts or less visible excess than it had before. In the formerly black township of KwaMashu, for example, many interviewees had witnessed violence by the police against criminal suspects. Their recourse against these officers was limited; not least because any case rested on the word of the complainant against that of a police official. The advent of mobile phones capable of capturing video, however, has brought important (although incomplete) shifts in this power dynamic. In recent years, residents argued, police officials had increasingly moved their violence and abuse into less visible

spaces. Sometimes, they had shifted into people's houses, where they could be more certain that witnesses endorsed their violence (Steinberg 2008). At other points they moved into police vans and cells where their actions, which remained largely impervious to the advent of new technologies. Even in a country that has a very poor track record of punishing 'police vigilantism' (Bruce 2002), these state actors felt their permissive space constrict.

If a permissive space constricts completely, we can say that it has closed. In such cases, those who previously covered by a permissive space will find themselves subject to punishment if they act illegally in the future. This process of closure can occur relatively quickly, as it did when people came to the aid of suspects being targeted by 'street justice',<sup>9</sup> changing the calculations of those who would have continued assaulting the suspect in question. To understand this process in more depth, let us focus on street justice in KwaMashu.

In KwaMashu, street justice is often imagined (in the media and by local residents) to be the work of an anonymous, sovereign mob attacking an alienated, evil criminal. In practice, however, street justice is more likely to be the work of an 'intimate crowd' (Cooper-Knock 2015): a collection of residents who are bound by multiple, inter-personal relationships, which may tie them to others in the crowd and to their victims. Consequently, the permissive space in which street justice can occur is the product of contestation and compromise with other residents and the state.

In some instances, permissive space was closed by the police who were called by observers or by participants in the assault. As I have argued elsewhere, narratives of 'mob justice' depict the police as being effectively absent from street justice in South Africa's townships, but this is often untrue (Cooper-Knock 2015). In fact, people frequently made recourse to the bureaucratic and coercive power of the police, on the understanding that police action would be limited to removing the subject of an assault and that they would not attempt to prosecute those involved in the act. In other words, the police were called to *close* a permissive space but not to *collapse* it – an act that would have jeopardised the impunity of those who had already acted. If the police acted within these parameters, they were seen as providing the 'necessary respect' to the crowd in a context where people claims that they had only taken action in the first place because the state had proved unwilling or unable to do so. As Sizamile, a middle-aged resident reflected on one recent instance of street justice: 'What happened? The usual. Once you fall into the hands of the community, you are given a hiding and the Police are called in to take you away. And you are fortunate if the Police are quick enough to come and take you away'. In such cases, the closure of permissive space marked a point in time at which an illegal act was brought to an

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<sup>9</sup> "Street justice" was one of several colloquial terms used to describe the collective physical punishment of a criminal, usually in a public space. It could serve a variety of ends that often elided policing and justice: identifying and punishing suspects, deterring future criminals, recovering stolen goods, and serving a plethora of other personal agendas. Unsurprisingly, given that such acts were often highly localized and escaped police statistics, neither residents nor the police conclusively knew how frequently street justice occurred. Interviewees estimated that lethal incidences in the sector were relatively infrequent, but non-lethal acts occurred almost daily.

end. However, closure could also have more wide-reaching consequences for the feasibility of similar acts in the future; for the impunity of particular actors; or for the use of specific spaces.

Of course, to argue that people hoped or expected the police to close rather than collapse permissive space is not to claim that they were always vindicated. The police are often keenly aware of the tacit arrangements that evolve with certain groups or in certain spaces, which shape the authority they can meaningfully exercise or the acquiescence that they can expect (Steinberg 2008). But that is not to say that they always adhere to these arrangements. For a mixture of institutional and personal reasons they may take actions that thwart the efforts of local residents to negotiate permissive space, earning their ire and sometimes their active resistance. In the formerly white suburb of Berea, for example, residents had hired a private security guard to protect their road called Innocent. One afternoon, Innocent confronted two men who were attempting to break into cars on the street. The men responded by attacking him. In response, two residents attempted to defend Innocent and punish the would-be car thieves by assaulting them with golf clubs. Afterwards, when a neighbour drove Innocent to the police station to report the attempted theft, they were berated by the police and informed that a case had already been opened against all involved by those they had attacked. As my research drew to a close, they were still facing criminal charges. Back in KwaMashu, interviewees recounted similar legal action (see also, Cooper-Knock 2016).

Given the dominant narrative of police inefficiency in South Africa, the acknowledgement that police *can* close permissive space - and were regularly called to do so - is theoretically and empirically significant. Similarly, it is important to recognise that the police had the capacity (albeit more limited and rarely attempted) to collapse permissive space. But, of course, the police were not the only operatives who could perform these manoeuvres: Permissive space could also be close by actors and processes based primarily *outside* the criminal justice system.<sup>10</sup> In KwaMashu, the family and friends of those being assaulted closed permissive space by threatening the moral or physical integrity of those committing the assault should they continue.

Alternatively, the suspect under threat of violence might have a sufficiently violent reputation to protect them. This was certainly the case for a drug dealer in Chatsworth called Anjeet, who utilised extreme violence (bolstered by selective philanthropy) to secure his permissive space. Anjeet had emerged from the loosely formed gangs that emerged when constructed and populated by the apartheid government (Pinnock 1984; Glaser 2000, 2008). Over multiple decades he had bought off, intimidated or killed anyone who might threaten him or his drugs network. Otherwise, he had developed a reputation for philanthropy in the sector, holding feeding stations, distributing Christmas hampers, and paying the electricity bills of those who stored his drugs. The most potent of these was Sugars – an impure opiate - that had taken hold of the lives of many

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<sup>10</sup> The terms 'outside' and 'inside' are hermeneutically useful here but I recognized that in the life of a dispute, these processes are often entangled.

young residents, known locally as 'Sugar Boys'. Whilst there were other drug dealers in the area, none were as dominant or operated in such a stable permissive space as Anjeet and he played a crucial role in mediating the permissive space of others.

Alvin, for example, was a drug addict whose family stored drugs for Anjeet. These two factors played an important role in shaping the permissive space that he could negotiate. Alvin's capacity to securing permissive space for himself or constrain the permissive space of others largely compromised by being his status as a 'Sugar Boy'. The archetypal Sugar Boy was, at once, an object of disdain and fear in Chatsworth:<sup>11</sup> Their desperation for drugs had placed them on a path towards physical decline and destitution but this same drive enabled them to engage in acts of extreme violence.

Labels, Ray Abrahams once argued, 'often have a lethal quality' (Abrahams 2008:433). That was certainly true in this sector, where the labeling someone a Sugar Boy was a powerful speech act (Jensen 2008; 2010). Undoubtedly, some residents were afraid to take any action against the Sugar Boys who stole from them. As Nileen, a resident in her fifties insisted, 'they would kill me, my baby, they are raw'. The numerous residents who were willing to take action, however, did so in the knowledge that the police would likely share their disdain for Sugar Boys. Stories were rife in the sector of such individuals getting 'slaps' from the Police who had 'no respect for smokers'. Consequently, attempts by drug addicts to open cases against their assailants could often be easily undermined.

Ronald, for example, was resident in his fifties. When he tried to move on Sugar Boys who were smoking on his stairs, they attempted to fight back physically. In response, Ronald assaulted them. When one of the young men attempted to open a case against Ronald, he resisted by using the claimant's addiction to denigrate his character: 'I told the Policeman I never handled him, he is drugged up, he is telling lies, he is trying to get away'. Whether this police man believed Ronald's account, sympathised with him, or simply wanted to avoid mediating a messy conflict, he supported Ronald's attempt to secure a permissive space: The case was never opened.

But if Alvin's status as a 'Sugar Boy' weakened his hand in negotiating permissive space his place within Anjeet's business empire potentially strengthened his leverage. Generally speaking, the degree to which Anjeet was willing to lend his weight to battles over permissive space depended on the degree to which he lent upon those involved for relational, economic, social or political traction. He was not, for example, willing to jeopardise the tacit communal support he had accrued through his selective philanthropy for those on the fringes of his network who were egregiously undermining law and social order in the area. In fact, he was willing to actively punish some of his customers and runners

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<sup>11</sup> Criminal archetypes are simplistic categories forged from a mixture of knowledge that is experiential and assumed; folk and empirical (Keith 2005). They draw for their construction on intimate life stories, and wider shifts in the social, economic and political landscape (Caldiera 2001).

personally when they were seen as stepping out of line with laws and local norms. As Simeon, a resident in his thirties, claimed, 'If maybe your son tend to fight, or tend not to be controllable in the house and if he was breaking things, if you report, he will send his gangs, they will sort out your child, yeah really they will give him [slaps hands] that discipline, you know he try to maintain order'.

Alvin was far from indispensable to Anjeet but he was useful. As such, the leverage he accrued via Anjeet in negotiations over permissive space was meaningful but limited. This leverage became evident in an altercation with Ronald, in which Alvin's family could not keep any permissive space open, but they could determine *how* it collapsed, and with what consequences. On the day in question, Alvin had snatched the phone of Ronald's son, Neville. Recognising that it was best to minimise any conflict with those linked to Anjeet, Ronald peaceably appealed to the Alvin's wife to return his phone. Unfortunately for Ronald, the phone had already been sold on to the local pawnbroker, who enjoyed even closer relations to Anjeet. Opening a case against the pawnbroker could threaten Anjeet's business network and would certainly provoke a response from 'Anjeet's boys'. However, Ronald felt he could risk opening a case against Alvin. When the Police were 'taking their time' in investigating his claims, Ronald personally visited the station, and demanded that a police officer accompany him to accost Alvin. Once they had been mobilised, the Police were reportedly keen to prosecute this Sugar Boy who had a string of previous allegations against his name. At this point, however, Alvin's wife re-emerged, reportedly stating, 'Please, we know you, you also know my... family, drop this charge and I will make sure that I will buy a phone and give it to you'. To 'know' a family in Chatsworth was to understand the ways in which their socio-economic circles were imbricated with Anjeet's networks. Recognising this statement as the veiled threat that it was, Ronald dropped the case in return for a replacement phone: He realised that he could secure the collapse of Alvin's permissive space, but not on the terms of his choosing.

In sum, this section has demonstrated the ways in which permissive space could be established, expanded, contracted, closed, and collapsed. Ultimately, these processes could involve a mix of actors, including state officials and those who traversed and blurred the constructed border between state and society. The repertoires on which people drew were also varied, pulling on the discourses of legality, morality, politics, and identity. Negotiations were shaped by the broad contours of post-apartheid South Africa, but they were also deeply rooted in the idiosyncratic socio-cultural, political, and economic landscapes of the local areas in which they emerged. Over time, people had forged expectations about what should and could be achieved in these negotiations. Such ideas were important but they were always subject to revision as different actors sought to shift their terms of engagement. Ultimately, who was punished, for what, by whom, was always subject to renegotiation.

### **Space and sovereignty**

Permissive space operates in dialectic with physical space. As geographers like Gregory and Urry (1985) have highlighted, we need to incorporate the analysis of space into our understandings of everyday life. On one level, space is an 'arena in which social life unfolds': Physical space is the stage on which illegal acts occur

and permissive spaces for those acts are contested but it is also a 'medium' through which relationships and realities are (re)forged (1985:3).

There are three key ways in which the dialectic between physical space inflected permissive space. Firstly, space can produce as well as reflect interpersonal connections between groups and individuals, shaping the 'bodies of relations' on which sovereignty rests (Latham 2000). At the broadest level, the sectors that I studied were still inflected in important ways by the apartheid government's remapping of race and place. The fact that these areas were racially zoned under the National Party shaped ideas of order and disorder, security and insecurity. The changes that have happened to these spaces since the fall of apartheid have variously amended and amplified these associations. All this has important implications for who tends to be targeted by acts of everyday policing, and by whom. Narrowing our focus down further, the forms of housing in which people live, from high-rises to single-story buildings, from gated estates to informal settlements, also shapes the parameters of the possible when it comes to permissive space.

Secondly, authority is always exercised in space, and delineated by it (Macdonald 2012). Within the urban landscape of eThekweni, there were spaces in which certain people could exercise a stronger claim to authority. In some cases, these claims were relatively narrow, and tied to an individual's profession or position: The head of a Resident's Association in her block's yard, or example, or a police officer inside his police station. In other cases, people could draw on broader claims to authority that were made possible through historical memory or metaphorical association. The historical image of the 'sovereign mob' on the streets of a township during apartheid, for example, remained a powerful one (see Smith 2012). It strengthened the hand of residents negotiating permissive space in the present day, although their negotiations were simultaneously constrained by the socio-political realities of everyday life.

Finally, space was important in the sense that urban form created spaces of visibility and invisibility, which have long shaped practices of statehood and sovereignty (Baviskar 2004; Zukin 1991). People are far more likely to be able to act outside the law if their actions are hidden because they do less to destabilise the *performance* of state power, even if they destabilise its practice. In Berea, Chatsworth and KwaMashu, this realisation shaped the behaviour of neighbourhood watch patrols who were seeking state support. Knowing which state officials and citizens would be most offended by, and likely to respond to, visible transgressions of state sovereignty required an intimate knowledge of the players involved and their shifting perspectives. Therefore, many of those on patrol attempted to maintain a performance of themselves as law-abiding citizens in visible, public spaces through a range of tactics, such as donning uniforms, writing constitutions, wearing badges and declaring that they would only 'hold suspects until the police came.' They also sought to contain any transgressions to less visible spaces where witnesses were few or known to be sympathetic. Where this was not possible, they realised that their ability to negotiate a permissive space for any transgressions would be more challenging.



A similar picture emerges from Lars Buur's (2009) work in Port Elizabeth, South Africa. He focuses his attentions on an organisation called *Amadlozi* who sought to police and punish criminal suspects in the township. Some of the police and citizens in their area, however, rejected any obvious displays of illegal violence. Consequently, members of *Amadlozi* used the local landscape to hide the punishments that they administered, making them palatable to state actors, and less likely to provoke a legal response.

## Conclusion

Despite its popularity in the literature on policing, I have argued that Agamben's decisionist approach to sovereignty and his concept of the 'state of exception' are too uni-dimensional, binary, and legalistic. At its root, sovereignty can be understood as a historically situated claim to authority over life, death and everyday conduct that is always 'grounded in violence' but which may or may not be grounded in state law (Hansen and Stepputat 2005). To understand the operation of sovereignty in daily life, we must comprehend the 'bodies of relations' on which claims to authority are made (Latham 2001), and the counter-claims with which they must contend. In order to do so, I have argued that we need a new conceptual language to explore the negotiation of *de facto* sovereignty. To this end, I have introduced the concept of 'permissive space'.

Permissive space is space of impunity, which can be expanded, contracted, closed or collapsed in negotiation with those inside, outside, and in the shadows of the state. Such negotiations can be antagonistic or amicable, and at times they may barely seem like negotiations in any meaningful sense. However, any concept tied to *de facto* sovereignty must always recognise the capacity for mutability over time and space, and between different audiences. This is what the concept of permissive space provides.

Analysing why different constellations of actors engage in a particular negotiation, the terms of their exchange, and its consequences tells us a great deal about the factors that shape the negotiation of law and social order in South Africa, and beyond: How do people understand their own (in)security? What are the archetypal criminals that haunt them? What forms of protection do they seek, why, and with what success? What ideas about authority have traction and why? Which relationships are most important in shaping everyday policing? The concept of permissive space enables us to search for concrete answers to these questions whilst also allowing us to capture all that is ambiguous and amorphous at the heart of everyday policing.

Although this article has focused in on South Africa, the concept of permissive space is applicable to the study of everyday policing elsewhere. The work of Philippe Bourgois (1995) in America; Didier Fassin (2013) in France; Denyer Willis (2015) in Brazil, and Beatrice Jauregui (2016) in India all highlight the importance of illegal policing practices within and beyond the state. The diversity of their collective work confirms that the parameters of permissive space will emerge out of the specific histories of a given space, and the particularities of its current social, economic and political landscapes. Going forward, comparative ethnographies of permissive spaces can help us to

delineate the different registers of authority and modes of contestation across the globe that fundamentally shape everyday policing and the relationship of law to life.